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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-608

RELIANCE INSURANCE COMPANY,
Petitioner,

VERSUS

DEBOER CONSTRUCTION, INC. and
THE INSURANCE CENTER, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

*JOHN B. HAYES, of
LOONEY, NICHOLS, JOHNSON & HAYES
219 Couch Drive
Oklahoma City, Oklahoma 73102
(405) 235-7641
Attorney for Petitioner
Reliance Insurance Company

October, 1976

* Counsel upon whom service is to be made

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

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RELIANCE INSURANCE COMPANY,
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VERSUS

DEBOER CONSTRUCTION, INC. and
THE INSURANCE CENTER, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Reliance Insurance Company, respectfully petitions the Court for a writ of certiorari to review the opinion entered in this case by the United States Court of Appeals for the Tenth Circuit.

(a) OPINIONS OF THE COURTS BELOW

The opinion of the Tenth Circuit Court of Appeals, yet unreported, is reproduced in Appendix A, pp. i-xvii. The petition for rehearing was filed on August 31, 1976, and was denied by order entered September 17, 1976. The order appears in Appendix B, pp. xvii-xix. There was no opinion in the trial court (U. S. District Court, Western District of Oklahoma, Honorable Luther Bohanon, presiding); however, the judgment is reproduced in Appendix C, pp. xx-xxi.

(b) JURISDICTIONAL GROUNDS

(i) The opinion of the Tenth Circuit Court of Appeals was entered on August 18, 1976.

(ii) Petition for rehearing was filed on August 31, 1976, and the order denying it was entered on September 17, 1976. Motion for an order to stay mandate pending application for certiorari was filed on September 22, 1976, in the Circuit Court of Appeals, but has not yet been acted upon.

(iii) This petition is being filed less than ninety days following the date upon which the petition for rehearing was denied. The jurisdiction of this Court is invoked under authority of 28 U.S.C., §1254(1).

(c) QUESTIONS PRESENTED

1. Under Oklahoma law, can a surety's attorney in fact, who has no actual authority to execute a construction bond in any amount without first obtaining the surety's permission, legally bind the surety to liability for any amount on a $925,000 penal amount contract performance bond when the power of attorney attached to the bond puts the bond obligee on notice that the attorney in fact is not authorized to execute any bond with penal amount in excess of $500,000?

(a) Can the partial validity doctrine of Restatement 2d of Agency, §164 (1958), be applied so as to render the bond valid up to $500,000 and remain consistent with Oklahoma statutes and decisional law?

(b) Can the partial validity doctrine be applied where the attorney in fact was acting in fraud of the

surety and was without either actual, implied or apparent authority to execute any bond, and remain consistent with Oklahoma statutes and decisional law?

2. Under the Oklahoma Statute of Frauds, is an oral promise to issue a construction contract payment bond, made by an attorney in fact for a surety to a proposed bond obligee, a valid or invalid promise to answer for the debt or default of another?

(a) Can the oral promise be taken out of the Statute of Frauds by partial performance on the part of the proposed obligee?

(b) Will consideration running from the proposed obligee to the proposed principal suffice for partial performance where the surety which is sought to be charged with liability does not receive the consideration or any benefit therefrom?

(c) Is the oral promise enforceable in any event where the attorney in fact did not have either actual, implied or apparent authority of the surety to make it?

3. Under Oklahoma law, is a corporate independent insurance agency liable to indemnify a surety which it represents for liability imposed upon the surety by reason of dishonest and unauthorized acts of an agency officer?

(a) Does issuance by the surety to the agency officer of a power of attorney relieve the agency of its obligation to indemnify the surety for losses sustained by it because of unauthorized risks created by the attorney in fact/agency officer?

(b) Where the agency agreement provides that the agency's authority to solicit and submit to the surety applications for bonds shall be set forth in the powers of attorney and letters of limitation to be issued to agency officer or employees, is the agency bound by the authority limitations, or has the agency fulfilled its obligations to the surety by simply requesting and securing from the surety powers of attorney for its officers or employees?

4. Does this petition present significantly important questions of state law which justify granting writ of certiorari for the purpose of thereafter certifying them to the Supreme Court of Oklahoma for answer?

(d) STATUTORY PROVISIONS INVOLVED

Title 25, Okla. Stat. §13 (1971), p. 2138, Vol. 2

Circumstances putting one on inquiry deemed constructive notice

Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself.

Title 15, Okla. Stat. §136 (1971), p. 1376, Vol. 1

Statute of frauds

The following contracts are invalid, unless the same, or some note or memorandum thereof, be in writing and subscribed by the party to be charged, or by his agent:

* * * * * *

2. A special promise to answer for the debt, default or miscarriage of another, except in the cases provided for in the article on guaranty.

Title 15, Okla. Stat. §321 (1971), p. 1391, Vol. 1

Guaranty defined

A guaranty is a promise to answer for the debt, default or miscarriage of another person.

Title 15, Okla. Stat. §424 (1971), p. 1396, Vol. 1

Agents' acts covered by indemnity agreements

An agreement to indemnify against the acts of a certain person, applies not only to his acts and their consequences, but also to those of his agents.

(e) STATEMENT OF THE CASE

Jurisdiction of the Trial Court

The jurisdiction of the trial court (U.S.D.C., W.D. of Oklahoma) was based upon diversity of citizenship under 28 U.S.C., §1332. DeBoer Construction, Inc., a Kansas corporation (hereafter "DeBoer"), brought action as plaintiff against Reliance Insurance Company, a Pennsylvania corporation (hereafter "Reliance"), The Insurance Center, Inc., an Oklahoma corporation (hereafter "Insurance Center"), Bruce Development Corp., an Oklahoma corporation (hereafter "Bruce Dev."), and Wayne Bruce (hereafter "Bruce"), seeking judgment in an amount far in excess of $10,000.

Basic Facts

There existed for a number of years an agreement between Insurance Center, an independent insurance agency in Oklahoma City, and Reliance, a commercial insurance and surety company, under which Insurance Center marketed or sold to its customers insurance policies and bonds when authorized to do so by Reliance. Both the agency agreement and the parties contemplated that Reliance would issue to selected Insurance Center employees powers of attorney so that they might conduct agency surety bond business by issuing for its customers, when authorized by Reliance, various bonds naming Reliance as surety and the customers as principal.

Insurance Center employed Dennis Winfrey and thereafter requested Reliance to issue him powers of attorney. Reliance, believing Winfrey to be competent and honest, issued to him, as attorney in fact, a power of attorney which limited Winfrey to executing surety bonds in penal amounts of $500,000 or less. Accompanying the power of attorney were explicit instructions to the effect that Winfrey was not authorized to execute any construction bond without first submitting the proposal to and obtaining the consent of Reliance.

Many months thereafter Winfrey became acquainted with Bruce, owner of Bruce Dev., a carpentry subcontractor which was financially incapable of securing legitimate construction bonds covering anticipated contracts. Winfrey made several unsuccessful attempts to find a company which would agree to act as surety for Bruce Dev. Winfrey did not, however, request that Reliance act as Bruce's

surety. Being unsuccessful in obtaining legitimate bonds, Winfrey and Bruce apparently decided that what some surety company, Insurance Center and proposed bond obligee did not know would not hurt them. It was then that Winfrey and Bruce set upon a course of conduct whereby Winfrey would furnish Bruce with blank bond forms and his Reliance powers of attorney to attach to them, knowing well that either Bruce or his wife would fill out the bond forms, sign his (Winfrey's) name to the bond as attorney in fact for Reliance, attach one of his powers and deliver the same to the proposed obligee.

Bonds covering two contracts were issued in this matter naming obligees other than DeBoer. Still other bonds were issued with DeBoer as obligee covering a subcontract on a construction project known as Pheasant Run, not the one that is the subject matter of this litigation. All of these bonds had penal amounts of less than $500,000. Winfrey never sought the authority of Reliance to issue the bonds, never reported them to either Insurance Center or Reliance and never collected or paid any premiums to Insurance Center for the account of Reliance. Conversely, Bruce surreptitiously paid Winfrey for his participation in the scheme and Winfrey used the funds for his personal benefit. Bruce, quite obviously, was fully aware of the dishonest scheme. Both Insurance Center and Reliance were completely unaware of the activities of Bruce and Winfrey.

Thereafter, Bruce was successful in negotiating with DeBoer a carpentry subcontract on an apartment house project in Peoria, Illinois, known as Seven Oaks, for which DeBoer was the general or prime contractor. This project is

the one involved in litigation. After DeBoer and Bruce settled upon a $925,000 subcontract price, Bruce and Winfrey caused to be executed another bogus performance bond by the very same methods they had employed in the past, all without the knowledge, consent or authority of either Insurance Center or Reliance. The performance bond had a penal amount of $925,000, named Reliance as surety, Bruce Dev. as principal and DeBoer as obligee, and was delivered to DeBoer with Winfrey's $500,000 limited power of attorney attached.

DeBoer officers and employees testified (and the trial court found) that they received the bonds delivered to them by Bruce on both projects (Pheasant Run and Seven Oaks) and looked them over but did not read the power of attorney to determine if Winfrey possessed the power to sign them on behalf of Reliance. DeBoer's vice president did admit, however, that he knew Winfrey's authority was defined in the power, that he should have read it and that attorneys in fact most always have some limitation upon their authority. Had the DeBoer officer read the power he would have learned that Winfrey had no authority with a $500,000 power to execute the $925,000 Seven Oaks bond.

Except for the misrepresentations made by Winfrey and the power of attorney itself, no representations of authority were made to DeBoer. DeBoer relied wholly upon statements made by Winfrey as to his authority.

In addition to the unread power of attorney attached to the bonds previously received by DeBoer on the Pheasant Run project, and prior to Bruce performing any work on the Seven Oaks project, DeBoer had notice of other facts

which should have provoked an inquiry into the ability of Bruce to obtain legitimate construction bonds, including a direct warning from a bank officer of the interim lender on the Pheasant Run project to the effect that Bruce was a perfidious and unsavory character who could not be trusted. Despite these notices and warnings, DeBoer never read the power of attorney attached to the Seven Oaks bond or made inquiry of Reliance or Insurance Center as to the authority of Winfrey to issue the $925,000 bond with a $500,00 limited power of attorney.

The inevitable occurred in the latter part of July, 1970, when DeBoer became concerned with the performance of Bruce Dev. and telephoned the Philadelphia home office of Reliance to determine if it had on record the Seven Oaks and Pheasant Run subcontract bonds. Reliance, of course, had no record of the bonds because they were neither authorized nor reported. An investigation was initiated immediately and Winfrey eventually disclosed all the bogus and unauthorized bonds, at least so far as has been determined to date.

With respect to the Seven Oaks bond which had a penal amount of $925,000, far in excess of the $500,000 limited power of attorney attached to it, Reliance denied liability to DeBoer on the theory that Winfrey was completely without any authority, either express, implied or apparent, to execute the bond because the power served as notice to DeBoer that Winfrey was exceeding even the "apparent authority" which might have been created by the power had DeBoer read it and had the bond been for $500,000 or less. In short, Reliance concluded that DeBoer

legally could not have relied to its detriment upon the insufficient power of attorney.

DeBoer advanced numerous theories of liability in the trial court, including a contention that Winfrey committed Reliance to an oral payment bond, and sought judgment for the loss it claimed to have suffered in completing the subcontract obligations of Bruce Dev. Following a trial on the merits, judgment was rendered in favor of DeBoer and against all defendants for $729,235.44. The trial court relied upon numerous theories advanced by DeBoer, including one alternative theory. Reliance was granted judgment over for indemnity against Insurance Center, employer of Winfrey.

On appeal the Circuit Court rejected the liability theories of apparent authority,[1] fraud, negligence, estoppel, waiver and ratification as against both Reliance and Insurance Center. Moreover, DeBoer's judgment against Insurance Center was vacated, as was Reliance's judgment over against Insurance Center. The $1 award of punitive damages against Reliance was likewise vacated.

The Court of Appeals affirmed the judgment against Reliance on the performance bond after reducing the award to $446,350.06, and also affirmed the alternative judgment against Reliance for $79,235.44, which was based upon the theory that Winfrey orally promised DeBoer to issue a labor and material payment bond.

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[1] To the extent that Winfrey could execute a $925,000 performance bond, as opposed to one for $500,000 or less.

Writ of certiorari is sought to review the holdings of the Circuit Court to the effect that (a) the completely unauthorized and bogus performance bond is binding upon Reliance up to $500,000; (b) partial performance (which did not exist) took the oral promise of Winfrey to execute a payment bond out of the Oklahoma Statute of Frauds; and (c) that Reliance, if liable to DeBoer, was not entitled to judgment for indemnity against Insurance Center, employer of the culprit, Winfrey, and the party with whom Reliance had the insurance agency agreement.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has either affirmed or created rules of law which are contrary to both the statutory and case law of Oklahoma and, in the opinion of Reliance, contrary to the case law of all the sister states. The questions presented for review are vitally important not only to Reliance but to the entire commercial surety industry which serves as the financial stabilizer of the construction industry. The resolution of these questions will directly affect the marketing system employed by commercial sureties almost from their very inception. Also directly and adversely affected will be other industries and professions which utilize powers of attorneys in conducting commercial transactions, not to mention use of powers by trusts and individual citizens.

Powers of attorney are necessary and proper tools of commerce, and traditionally the authority contained in powers has been strictly construed and not enlarged by court construction. A different rule would not only deter

men from even delegating powers to others, and thus retard factors and agencies in commerce, but would vest a most dangerous discretion in the courts to vary the agreements of parties.

As applied in this case, one rule adopted by the lower courts, which never before existed, has the effect of enlarging the authority granted in a power of attorney and letters of limitation so as to vary the agreement of the parties.

The second rule creates a new exception to the Oklahoma Statute of Frauds which declares "invalid" oral agreements to answer for the debt, default or miscarriage of another.

The third rule adopted by the lower courts has the effect of relieving a corporate insurance agency from liability for the acts of its officers and employees who, by exceeding their authority, impose liability upon insurance underwriters represented by the agency. This rule is in direct conflict with well-settled principles of agency law.

The basic reason given by the Court of Appeals for adopting these rules was the "apparent lack of controlling authority" and the desire to defer to the judgment of the resident district judge. Reliance respectfully submits that these rules constitute such a severe departure from well-established business practices and procedures, based upon equally long-standing legal principles, that this Court should grant the requested writ and either reverse the lower courts or certify these critical and important legal questions to the Supreme Court of Oklahoma under applicable statutes. Any radical change of state law should be

determined by the highest court of that state, not by a Federal District Court or even a U. S. Court of Appeals which simply defers to the opinion and judgment of the trial court.

Both the trial court and the Court of Appeals misapplied existing Oklahoma authorities, both statutory and decisional, as hereafter explained.

The Lower Court Misapplied the Partial Validity Exception Doctrine of Restatement 2d, Agency, §164 (1958), Contrary to Oklahoma Law

The Court of Appeals acknowledged that Winfrey was without actual or express authority to issue any bond without first obtaining approval of Reliance. Thus, the question became whether or not Winfrey had apparent authority from DeBoer's viewpoint to issue the $925,000 performance bond.

Apparent authority is that which an agent appears to have by reason of some act or representation by the principal himself.[2] The prerequisites to establish apparent authority are: (1) representations by the principal that the agent has authority; (2) knowledge of the representations and good faith reliance thereon by the third party; and (3) a change of position to his detriment and loss by the third party.[3] Reliance made no representations to DeBoer not set forth in the power of attorney. DeBoer did not read the power and rely upon it. DeBoer relied wholly upon the

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[2] 3 Am.Jur.2d, *Agency*, §§73-76, pp. 475-480.

[3] *Institute of Business Planning, Inc.* v. *Standard Life & Acc. Ins. Co.*, 242 F.Supp. 100 (W.D. Okl. 1965); *Rosser-Moon Furniture Co.* v. *Oklahoma State Bank*, 135 P.2d 336 (Okl. 1943).

representations of the attorney in fact, Winfrey, which under the law are insufficient to establish any authority whatsoever.[4]

Moreover, a person who deals with an agent knowing that he is acting under a power of attorney is bound to ascertain and know the character and extent of his authority under the power.[5] The principle is statutory in Oklahoma.[6] The Court of Appeals acknowledged that ". . . The evidence falls squarely within the rule stated and DeBoer cannot escape its effect by relying on indicia of a greater apparent authority," and that knowledge "that an agent has limited authority defeats any right to rely on apparent authority."[7]

Had DeBoer read the power of attorney, as the settled law of Oklahoma requires, it would have learned that Winfrey could not execute a $925,000 penal amount bond and would or should have rejected it as improper and

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[4] *American National Bank* v. *Bartlett*, 40 F.2d 21 (10 Cir. Okl. 1930); *S. S. Silberblatt, Inc.* v *Seaboard Surety Co.*, 417 F.2d 1043 (8 Cir. 1969); 3 Am.Jur.2d, *Agency*, §74, p. 476.

[5] 3 Am.Jur.2d, *Agency*, §81 (1962); Restatement 2d of Agency, §167 (1958); *Stovall* v. *Commonwealth*, 4 S.E. 379 (Va.App. 1887); *Dugan* v. *Champion Coal & Towboat*, 49 S.W. 958 (Ct.App.Ky. 1899); *Barrett Co.* v. *Globe Indem. Co.*, 159 Atl. 709 (N.J. 1932); *Schenker* v. *Indemnity Ins. Co. of N. Am.*, 340 Pa. 81, 16 A.2d 304 (S.Ct 1940); *Sharpstown State Bank* v. *Great American Ins. Co.*, 441 S.W.2d 548 (Tex.Civ.App. 1969); *American Surety Co. of N. Y.* v. *Cross*, 80 S.W.2d 470 (Tex.Civ.App. 1935); *Indemnity Ins. Co. of N. Am.* v *Lane Contracting Corp.*, 227 F.Supp. 143 (D.C. Neb. 1964).

[6] Title 25, Oklahoma Statutes, §13 (1971). See Statutory Provisions, *supra*, for text.

[7] Appendix A, p. v. See: *Mid-Continent Petroleum Corp.* v. *Wilhoit*, 270 P.2d 645 (Okl. 1954); *F.D.I.C.* v. *Grim*, 86 P.2d 774 (Okl. 1938).

demanded that Bruce Dev. furnish a valid bond. At a minimum, a reading of the power demanded that DeBoer inquire of Reliance as to Winfrey's actual authority.[8] Such an inquiry would have disclosed the complete absence of authority to issue a bond for any amount.

Therefore, not having read the power, so far as DeBoer was concerned Winfrey had no authority whatsoever. Other cases with almost identical facts have denied the obligee on unauthorized bonds any relief.[9] Failure to read the power is the same as if no power had been attached, and relief is likewise denied.[10]

Up to this point the Court of Appeals did not disagree with the legal position taken by Reliance. However, to sustain its conclusion that the bogus bond was valid up to $500,000, the lower court reasoned that because factually this was a case of first impression in Oklahoma, great deference should be given to the opinion of the resident district judge.[11]

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[8] *DeWeese* v. *Baker-Kemp Land Trust Corp.*, 102 P.2d 884 (Okl. 1940). A person is deemed to know what an inquiry might reveal. Failure to make inquiry has been characterized as a species of fraud. 58 Am.Jur.2d, *Notice*, §8, p. 491.

[9] *Stovall* v. *Commonwealth*, 4 S.E. 379 (Va.App. 1887); *Dugan* v. *Champion Coal & Towboat*, 49 S.W. 958 (Ct.App.Ky. 1899).

[10] *Barrett Co.* v. *Globe Indemnity Co.*, 159 Atl. 709 (N.J. 1932); *S. S. Silberblatt, Inc.* v. *Seaboard Surety Co.*, 417 F.2d 1043 (8 Cir. 1969); *Schenker* v. *Indemnity Ins. Co of N. Am.*, 340 Pa. 81, 16 A.2d 304 (S.Ct. 1940); *American Surety Co. of N. Y.* v. *Cross*, 80 S.W.2d 470 (Tex.Civ.App. 1935).

[11] Appendix A, p. ix. Reliance does not agree that it is truly a case of first impression. Admittedly, the precise facts involved have not been before the Oklahoma Supreme Court, but that Court has adopted rules of law which have been applied to similar factual situations which do not differ in principle.

The lower court based its reasoning upon an erroneous premise—that Winfrey had authority to issue bonds with penal amounts up to $500,000. Although Winfrey was given a power to attach to bonds issued by him to evidence his "apparent" authority to third persons, he was instructed in writing that he was not authorized to issue any construction bond without first obtaining approval from Reliance.[12] Thus, there was no actual or implied authority and there was no "apparent" authority because DeBoer did not read and rely to its detriment upon the power. Nevertheless, the lower court noted that The American Law Institute had recognized the problem but had not attempted to state a rule, citing Restatement 2d of Agency, §164(2) (1958), as follows:

> "Where the only difference between the contract as authorized and the contract as made is a difference as to amount, or the inclusion or exclusion of a separable part, the principal is liable upon the contract as it was authorized to be made, provided that the other party seasonably manifests his willingness to accept the contract as it was authorized."

This statement is followed by the caveat that the rule does not include the situation in which the agent is also acting in fraud of the principal, as to which no statement of law was made. The trial court specifically found that Winfrey was acting in fraud of Reliance and Insurance Center as well as DeBoer.

The Court of Appeals acknowledged that in jurisdictions other than Oklahoma the partial validity rule set forth

[12]Appendix A, p. ii.

in §164(2) had been recognized,[13] but rejected Reliance's argument that all of those decisions involved situations where the agent had actual or express authority to bind the principal.

It was then reasoned that if a principal may ratify a contract made in excess of an agent's authority, then the third person should be able to accept a contract for a lesser amount as originally authorized by the principal. Again, the premise is invalid. Winfrey had no original authority.

The fairness of the partial validity doctrine is justified by the lower court with the statement that the principal need not be given the option of avoiding, by failing to ratify, the very contract the principal intended the agent to make simply because of the agent's mistaken exercise of authority. Again, Reliance did not authorize or intend for Winfrey to issue any bond without its permission. Winfrey made no mistake. He intended to and did commit fraud.

Next the lower court reasoned that applying the partial validity doctrine in this case—despite the caveat of Restatement 2d that it was inapplicable to fraudulently created agreements—would not be at odds with the rule requiring a person dealing with an attorney in fact to read the power to ascertain his apparent authority and, if circumstances dictate, ascertain the attorney's actual authority from the principal. The Court readily acknowledges that

[13]The rule is statutory in Oklahoma with respect to powers of attorney authorizing the disposition of real property. Title 60, Oklahoma Statutes, §236 (1971). Had the Oklahoma Legislature intended the rule to apply to other situations it would have adopted similar statutes. It didn't.

the purpose of the rule imposing a duty to read a power and make inquiry was to prevent fraud by the agent.

The next step in reasoning was that the incentive to ascertain the authority of agents would not be diminished because the person dealing with them would still be subjected to possible loss when the agent fraudulently exceeds his authority. In summary, the Court of Appeals concluded that dividing the responsibility in the event of loss could encourage both parties to exercise greater prudence. The responsibility the courts below imposed upon Reliance was to supervise its attorneys in fact so as to protect the public from loss should the attorneys in fact fraudulently execute contracts in excess of their authority.[14] Oklahoma has not adopted such a rule, and it is very unlikely that it would do so in this type situation because the very purpose of a power of attorney is to permit the attorney in fact to act in the absence of the principal. Moreover, no amount of supervision can prevent dishonesty.

The very purpose for the rule requiring third parties to ascertain the actual or apparent authority of special agents (attorneys in fact) is to prevent fraudulent and unauthorized contracts of which the principal has no knowledge or method of preventing short of having someone accompany the special agent every moment. The rule places the burden squarely upon the only person capable of protecting himself and preventing the fraudulent or unauthorized act—the third party who is dealing with the agent. The rule adopted by the Court of Appeals completely re-

[14]The Court cites *Gilmore* v. *Constitutional Life Ins. Co.*, 502 F.2d 1344 (10 Cir. 1974), which neither involved Oklahoma law nor similar facts.

lieves the third party of the duty to ascertain the agent's authority—even when the third person knows or is charged with constructive knowledge that the agent is exceeding his authority. DeBoer did not fulfill any of its legal obligations and the Court of Appeals so acknowledged—even to the point of characterizing its failure as contributory negligence.

The factual situation now before the Court cannot be likened to a case in which an agent has actual or expressed authority up to a certain amount, and the third party is unaware, actually or constructively, that the agent is exceeding his authority. In those situations in which the partial validity doctrine is applied the agent possesses actual authority to act, and it is not unjust to permit the third party to accept the authorized portion and, likewise, permit the principal to reject the unauthorized portion.

Restatement 2d of Agency, §166, demonstrates the point by providing that a ". . . person with notice of limitation on the agent's authority cannot subject the principal to liability upon a transaction with the agent if he should know that the agent is acting improperly. . . ." DeBoer should have known Winfrey was acting improperly—the power was there for the reading. Should DeBoer's failure to exercise its duty under Oklahoma law permit it to plead ignorance or negligence and subject Reliance to liability for any amount? The answer should be no!

A careful reading of §164, *supra*, reveals that there are several prerequisites to its application. First, it does not apply to situations in which the agent is acting in fraud of his principal—the caveat so states. Secondly, it applies only

where the third party is unaware that the agent is exceeding his authority—§166, *supra*, says that the third party cannot subject the principal to liability when he should know the agent is acting improperly.[15] Thirdly, the contract (bond) must be partially authorized—there was no authority, actual or apparent. Comment a. of §164, in explaining the rationale of the partial validity doctrine, states that it subjects the principal to liability ". . . only in accordance with his *expressed intent* and before he has changed his position"[16] (emphasis added). There was no expressed intent or authority. Fourthly, the third party, DeBoer, must ". . . seasonably manifest its willingness to accept the contract as authorized." DeBoer did not do so—it received the bond shortly after March 12, 1970, but did not contact Reliance until July 29, 1970. In fact, DeBoer never manifested its willingness to accept a bond with a penal amount of $500,000 or less, but continued throughout the trial and appeal to contend that the bond was valid for $925,000.

The difference was not only one of amount. The testimony was that the amount and type of contract, not the bond, and the ability, financial worth and personal integrity of the bond principal (contractor) determines the risk of loss attendant to a construction bond. The $925,000 contract cannot be separated from the risk assumed under a performance bond simply by reducing the bond penalty to conform to limits set forth in a power of attorney. The risk

[15]See: *Home Owners Loan Corp.* v. *Thornburgh*, 106 P.2d 511 (Okl. 1940).

[16]The position of Reliance changed to its detriment because the work was well underway and thousands of dollars had been paid Bruce Dev. before Reliance ever learned of the bogus bond.

is the same regardless of the penal amount of the bond, although the loss of the surety is limited to the penal amount in the event of default. In applying the partial validity doctrine the lower courts have materially changed the contract (bond) made by the dishonest agent so as to give the power of attorney an "appearance" of authority, all after the fact. In summary, the rule employed by the Court of Appeals has the effect of permitting the courts to alter or reform contracts so as to authorize their execution, and thus relieve a third party from his duty to ascertain the authority of a special agent.

Although the Court of Appeals professed to be dividing the responsibility by the adoption of the new rule, in reality it imposed all of the loss upon Reliance. The lower court's reasoning could be used to argue that DeBoer should suffer the first $425,000 in loss ($925,000 minus $500,000) and Reliance the next $500,000. In both cases the reasoning is unsound. Admittedly, had the bond originally provided for a penal amount of $500,000 or less, and had DeBoer read and relied to its detriment and loss upon the "apparent" authority the power represented without any knowledge, actual or constructive, that Winfrey was acting improperly, then Reliance would have been liable under applicable principles of law and would have confessed liability as it did on the Pheasant Run project. However, those facts did not exist and the Court should not alter them by changing the amount of the bond to conform to the limits of apparent authority set forth in the power.

In summary, the opinion of the Court of Appeals is contrary to established Oklahoma law, and sets a dangerous precedent which could have a very adverse effect on the

long-standing commercial surety bond marketing system, as well as upon individuals, trusts and others who use powers of attorney in conducting business and personal affairs.

This Court should grant the writ and reverse the opinion and judgment of the lower courts or grant the writ and certify the questions to the Supreme Court of Oklahoma under Title 20, Oklahoma Statutes, §§ 1601, *et seq.* (Supp. 1973) (reproduced in Appendix D).

The Oral Promise to Execute a Payment Bond Was Invalid Under Oklahoma Statute

The trial court found that Winfrey verbally promised DeBoer that he would secure on behalf of Bruce Dev. a separate payment bond[17] covering the Seven Oaks subcontract but failed to do so. There was no evidence as to the penal amount of the promised bond or that Reliance would be the surety, as opposed to some other surety represented by Insurance Center for which Winfrey held a power of attorney. The Court of Appeals affirmed an alternative trial court finding of an oral payment bond and the resulting judgment against Reliance for $79,235.44, the amount of job bills of Bruce Dev. which DeBoer claims it was forced to pay but which should have been paid by Reliance had a payment bond been issued.

The reason given for affirming the trial court was that there had been partial performance sufficient to remove the oral promise from the Oklahoma Statute of Frauds. The statute [Title 15, Oklahoma Statutes, §136 (1971)]

[17]In addition to the bogus but written performance bond.

renders "invalid" oral promises to answer for the debt, default or miscarriage of another. Construction bonds are such contracts.[18] The Oklahoma Supreme Court has held that, as distinguished from an agreement of indemnity, a suretyship agreement is a promise to one to whom another is answerable—an agreement to answer for the debt, default or miscarriage of another.[19] Assuming, as we must and as did the Court of Appeals, that a promise to issue a payment bond falls within the Statute of Frauds, the question becomes whether or not there was anything to take the promise out of the statute and render it enforceable, as opposed to "invalid."

The partial performance relied upon by both the trial court and the Court of Appeals was DeBoer's argument that a progressive subcontract payment made to Bruce Dev. included funds for reimbursement of bond premiums which Bruce Dev. represented it had or would have to pay. There was no evidence that Reliance or Insurance Center

[18]*In the Matter of the Estate of Bollerut (Otto Gas, Inc.)* v. *Stewart*, 69 N.W.2d 945 (Neb. 1965); *Standard Acc. Ins. Co.* v. *Simpson*, 64 F.2d 583 (4 Cir. 1933); *Everly* v. *Equitable Surety Co.*, 190 Ind. 274, 130 N.E. 227; *Commonwealth* v. *Hinson*, 143 Ky. 428, 136 S.W. 912; *National Materials Co.* v. *Guest*, 147 So. 771; *Williams* v *Breazeale-Hyams Motors*, 16 La.App. 291, 134 So. 330; *Fellows Box Co.* v. *Mills*, 86 N.H. 267, 167 Atl. 153; *Horning* v. *Fidelity & Deposit Co. of Md.*, 35 N.E.2d 978; *Craswell* v. *Biggs*, 160 Ore. 547, 86 P.2d 71; *Peters* v. *Bechdolt*, 100 Ind.App. 395, 192 N.E. 116; *Amelco Window Corp.* v. *Federal Ins. Co.*, 127 N.J. Super. 342, 317 A.2d 398 (1974). See also 9 Appleman on Insurance, §5338, p. 172.

[19]*Oppenheim* v. *National Surety Co.*, 231 Pac. 1076 (Okl. 1925). Oklahoma statute defines "guaranty" as a promise to answer for the debt, default or miscarriage of another. Title 15, Oklahoma Statutes §321 (1971). See also *American Casualty Co.* v. *Devine*, 157 So.2d 661 (Ala. 1963), wherein the Court held that a payment bond fell within the Statute of Frauds.

received anything. Conversely, the evidence was that by prearrangement Bruce paid Winfrey for his participation in the dishonest scheme and that the latter used the funds for his personal benefit. Assuming for the purpose of argument only that Winfrey had authority to make the oral promise,[20] where was the partial performance which would take the promise out of the statute? The bond was never issued as promised and premiums were never paid directly or indirectly to the person sought to be charged with liability.[21]

While recognizing that payment alone is not sufficient to take oral contracts involving interests in land out of the statute under Oklahoma law[22] and that the "part performance" doctrine does not normally apply to promises to answer for the debt or default of another,[23] the Court of Appeals held that there had been part performance (DeBoer paying Bruce Dev. under the subcontract) and that the oral promise was taken out of the Statute of Frauds. The apparent lack of controlling Oklahoma authority was

[20]In *Schenker* v. *Indemnity Ins. Co. of N. Am.*, 340 Pa. 81, 16 A.2d 304 (S.Ct 1940), the Court refused to bind a surety to an oral promise made by an attorney in fact to issue a contract bond which he could not have issued in writing under authority of the power of attorney and the authority instructions issued by the surety.

[21]The Court of Appeals relied upon 37 C.J.S., *Frauds, Statute of*, §253 (1943), which says the party sought to be charged must receive the benefit of the performance by the other party.

[22]Appendix A, p. xii; see also *Sarber* v. *Harris*, 368 P.2d 93 (Okl. (1962); *Hickey* v. *Ross*, 172 P.2d 771 (Okl. 1946); *Fry* v. *Penn. Mutual Life Ins. Co.*, 159 P.2d 550 (Okl. 1945); and *Nichols* v. *Edmundson*, 232 P.2d 68 (Okl. 1924).

[23]Appendix A, p. xiii. 37 C.J.S., *Frauds, Statute of*, §253 (1943); 73 Am.Jur.2d, *Statute of Frauds*, §468 (1974).

the reason given for affirming the trial court.[24] None of the cases or treatises mentioned or cited either by the Court of Appeals or DeBoer in its brief stands for the proposition that partial performance of an oral promise to answer for the debt or default of another is sufficient to overcome the statutory mandate of invalidity. The reason for the lack of any such authority is the simple fact that were the doctrine applied to such contracts the Statute of Frauds would not serve its intended purpose—to eliminate the possibility of fraud arising from perjured testimony concerning alleged oral agreements.[25]

Admittedly, Oklahoma follows the general rule that a "fully executed" oral promise to answer for the debt, default or miscarriage of another is not invalid.[26] Winfrey's alleged promise was not partially or fully executed. No premiums were paid to Reliance or Insurance Center and no written bond was executed. DeBoer paid funds to Bruce Dev. and no one else. Although the Oklahoma Supreme Court has never passed directly upon identical facts, it has held that part performance is insufficient to render valid oral contracts not to be performed within one year.[27] The

[24]Appendix A, p. xiii.

[25]37 C.J.S., *Frauds, Statute of*, §1 (1943).

[26]*McEwen* v. *Vallentine*, 170 Pac. 490 (Okl. 1918).

[27]*Dicks* v. *Clarence L. Boyd Co., Inc.*, 238 P.2d 315 (Okl. 1951); *St. Louis Trading Co.* v *Barr*, 32 P.2d 393 (Okl. 1934). Oklahoma has applied the partial performance doctrine only to real estate transactions [*Stinchcomb* v. *Stinchcomb*, 246 P.2d 727 (Okl. 1952); *Harris* v. *Arthur*, 127 Pac. 695 (Okl. 1912)], and to sale of personal property transactions which were made subject to the doctrine by statutory language [see Title 15, Oklahoma Statutes, §136(4), now repealed and replaced by Title 12A, Oklahoma Statutes, §§2-201 (Uniform Commercial Code)].

situations are similar and analogous. Neither case involves evidence and testimony which can be conclusively free of the possible fraud the statute was designed to prevent. The authorities across the nation appear to be unanimous that part performance is insufficient to take an oral promise to answer for the debt or default of another out of the Statute of Frauds,[28] and there is no reason to surmise or conclude that the Oklahoma Supreme Court might hold otherwise.

The danger of the precedent created by the Circuit Court's opinion is readily apparent. Under the rule created by the opinion, it would be possible for one or more persons to fraudulently impose liability upon an innocent third party, whether commercial surety or otherwise, simply by committing perjury. An aspiring but dishonest obligee or creditor would need only falsely testify that an oral promise was made by one person (surety or guarantor) and that consideration was paid to still another person (the debtor), and the very fraud which the statute was designed to prevent would be perfected assuming, of course, that the perjured testimony were believed.

If the opinion of the Court of Appeals is allowed to stand as precedent for Oklahoma law, many frauds may be perpetrated before the Supreme Court of Oklahoma has an opportunity to pass upon the question. In fact, a fraud which the statute was designed to avoid may have been perpetrated in this case. The statute places the burden upon the person who intends to rely on the promise to get it

[28]37 C.J.S., *Frauds, Statute of*, §253 (1943); 73 Am.Jur.2d, *Statute of Frauds*, §468 (1974), and cases cited therein.

reduced to writing and signed by the party sought to be charged. DeBoer failed to do so, just as it failed to read the power of attorney. The Court of Appeals, in essence, has shifted the burden to Reliance, even though there was no evidence that Winfrey promised, either orally or in writing, that Reliance would be the surety on the proposed payment bond which was never issued.

It is respectfully submitted that a writ of certiorari should be granted on this issue, and that this Court either reverse the holding of the Court of Appeals or, at a minimum, certify the question to the Oklahoma Supreme Court for an answer of what the Oklahoma law is or should be. Certification of legal questions can be accomplished under Oklahoma's Certification of Questions of Law Act, Title 20, Oklahoma Statutes, §§ 1601 *et seq.* (Supp. 1973) (pertinent portions reproduced in Appendix D).

Reliance Was Entitled to Indemnity From Insurance Center

The Court of Appeals vacated the judgment of Reliance for indemnity against Insurance Center. The trial court judgment was not supported by findings and conclusions, although appropriate ones were tendered by Reliance. This failure was brought to the attention of the Court of Appeals. However, the judgment was vacated by the Court of Appeals not because of the lack of findings and conclusions, but because the Court of Appeals determined that a relationship separate and apart from the agency agreement between Reliance and Insurance Center was created when Reliance issued powers of attorney to Winfrey. In short, the Court of Appeals held that Insurance Center was not

responsible for the dishonest acts of its officer, Winfrey, which imposed liability upon Reliance.

The relationship between Reliance and Insurance Center was not unusual. It was the typical relationship which exists between an insurance carrier and an independent insurance agency. Insurance Center, being a corporation, operates its agency business through officers and employees. Insurance Center requested that Reliance issue powers of attorney to Winfrey so that he might conduct agency bond business. The agreement between Reliance and Insurance Center provides in pertinent part: "The Agent [Insurance Center] is hereby granted authority to solicit and submit applications for surety bonds; . . . in the case of bonds such authorization to be set forth in Powers of Attorney and Letters of Limitation; . . ." The agreement also obligates "The Agent" to pay over all premiums shortly following the month in which policies and bonds are issued. Insurance Center's president testified that the agency agreement contemplated that powers of attorney were to be issued to agency employees who handled bond matters. The "Letters of Limitation" delivered to Winfrey stated, in pertinent part, that writing unauthorized risks ". . . may subject you personally and the agency to full responsibility. . . ."

The Court of Appeals, in construing the agency agreement, determined that Insurance Center's only obligation to Reliance was to secure from it for selected agency employees powers of attorney before allowing them to solicit and submit bond applictaions. The Court of Appeals apparently did not take into consideration the contract language: ". . . such authorization to be set forth in Powers of Attorney

and Letters of Limitation . . ." (emphasis added). It was, of course, the letters of limitation which specified that Winfrey could not issue any construction bond without prior approval of Reliance. Nevertheless, the Court of Appeals held that Insurance Center did not have to comply with the letters of limitation upon the theory that Reliance had entered into a completely separate agreement with Winfrey and was entitled to indemnity only from him. This narrow interpretation of the agency agreement completely ignores the language in the agreement that the ". . . authorization [is] to be set forth in Powers of Attorney and Letters of Limitation; . . ." Neither Reliance nor Insurance Center intended that there be a separate agency agreement with Winfrey; otherwise, provisions would have been made for him to collect premiums and retain commissions.

The Court of Appeals, in essence, has avoided application of the well-established doctrine that an agent who exceeds his authority owes an obligation of indemnity to his principal by concluding that Insurance Center was not Reliance's agent with respect to the dishonest acts of Winfrey.

The effect that this precedent would have on the insurance and bond marketing system which has been employed for many, many years is apparent. Corporate and individual insurance agencies would no longer be responsible for the unauthorized acts of their employees who are given specific limited authority at the request of the agent under the agency agreement. The conclusion of the Court of Appeals would appear to be gross error of law. Moreover, in reaching this conclusion the Court relied upon an erroneous find-

ing of the trial court to the effect that Winfrey ". . . had authority and the power to bind Reliance in all material respects in this action." There was absolutely no evidence to support this finding. The only authority given Winfrey was to submit to Reliance, through the insurance agency, applications for contract bonds, which would either be approved or disapproved by Reliance. Even the opinion by the Court of Appeals acknowledges that Winfrey was without authority to issue any bond without first obtaining approval from Reliance. This erroneous finding should not serve as a basis for relieving The Insurance Center from its obligation to indemnify Reliance against liability created by agency employees who exceed their authority.

In fairly construing the relationship under the agency agreement between Reliance and Insurance Center, it seems only proper to conclude that Insurance Center was, in fact and in law, the independent insurance agent of Reliance with certain limitations of authority. With respect to contract bonds, the authority was to be set forth and described in powers of attorney issued to agency employees and in the "Letters of Limitation" which accompanied the powers. The limitations did not and were not intended to apply solely to the individual employee to whom the power of attorney was issued, but applied to the corporate agency as well. The failure of Winfrey to observe the limitations was a failure of "The Agency" for which it should be liable over to Reliance.

The Court of Appeals did not find inapplicable the authorities cited by Reliance to the effect that an agent owes to its principal the duty of indemnity arising out of

liability created by his unauthorized acts or the acts of his employees.[29] The principle was well put by the Court of Claims in *Victory Carriers, Inc.* v. *United States*, 467 F.2d 1334, 1341 (Ct. Clms. 1972), as follows: ". . . It is well established that an agent is responsible to his principal for the actions of a sub-agent in handling the affairs of the principal which have been trusted to the sub-agent."

It is respectfully submitted that the Court of Appeals has completely misconstrued the relationship between Reliance and Insurance Center and the obligations owed by each to the other. Because of the drastic effect which the opinion of the Court of Appeals would have upon the insurance industry in Oklahoma—possibly nationwide—this Court should issue writ of certiorari, and reinstate the judgment entered by the trial court. Certification of the question of law to the Supreme Court of Oklahoma for an answer would be helpful even though the trial court did not enter specific findings and conclusions.

Of course, should the judgment in favor of DeBoer against Reliance be vacated, then the issue of indemnity becomes moot.

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[29]Annot., 35 A.L.R.3d 907, "Liability of Insurance Agent for Exposure of Insurer to Liability Because of Issuing Policy Beyond Authority or Contrary to Instructions." Counsel has been unable to find an Oklahoma decision directly in point. However, Title 15, Okla. Stat., §424, provides: "An agreement to indemnify against the acts of a certain person, applies not only to his acts and their consequences, but also to those of his agents." See also: Restatement 2d of Agency, §401: "An agent is subject to liability for loss caused to the principal by any breach of duty." Comment d. illustrates the principle. Restatement 2d of Agency, §406, provides that an agent is as responsible to the principal for the conduct of subservants and subagents as the agent is for his own conduct.

CONCLUSION

Reliance respectfully requests the Court to grant writ of certiorari to review and reverse the opinion of the Court of Appeals and the judgment of the trial court.

The partial validity doctrine is inapplicable to the facts of this case and has never been adopted in Oklahoma. Its application has the effect of overruling established decisional law of Oklahoma as well as some statutes.

In giving validity to an oral promise to answer for the debt or default of another, the Court of Appeals has ruled contrary to an Oklahoma statute and, so far as Reliance can determine, has ruled contrary to the decisions of all the sister states which have passed upon the issue.

Although there are no Oklahoma decisions directly on point, the vacation of Reliance's judgment over against Insurance Center for indemnity would appear to be contrary to well-established general law.

Realizing that this Court, as most others, has a heavy work load, Reliance respectfully submits that in any event the writ should be granted so that the questions presented may be certified for answer to the Supreme Court of Oklahoma, the Court which should, if at all possible, decide critical questions of Oklahoma law. See Appendix D for the statutory authority for certifying questions.

Respectfully submitted,

JOHN B. HAYES
219 Couch Drive
Oklahoma City, Oklahoma 73102
(405) 235-7641
Attorney for Petitioner
Reliance Insurance Company

October, 1976

APPENDIX A

PUBLISH

(filed August 18, 1976)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

DeBOER CONSTRUCTION, INC.	)	
	)	
Plaintiff-Appellee-Appellant,	)	
	)	
v.	)	Numbers
	)	74-1581
RELIANCE INSURANCE COMPANY	)	74-1582
and THE INSURANCE CENTER, INC.,	)	74-1583
	)	(Consolidated)
Defendants-Appellants-Appellees,	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA (D. C. No. 71-252)

John B. Hayes, Oklahoma City, Oklahoma, for Defendant-Appellant-Appellee, Reliance Insurance Company.

William G. Smith (Edward L. Ray, on the brief), Oklahoma City, Oklahoma, for Defendant-Appellant-Appellee, The Insurance Center, Inc.

Brian G. Grace (John R. Stallings and Windell G. Snow, Wichita, Kansas, and William J. Ross, Oklahoma City, Oklahoma, on the brief), Oklahoma City, Oklahoma, for Plaintiff-Appellee-Appellant, DeBoer Construction, Inc.

Before BREITENSTEIN, HILL and BARRETT, United States Circuit Court Judges.

HILL, Circuit Judge.

This is an appeal from a judgment in three consolidated cases. As it comes to this Court, each party is an

appellant and an appellee. The litigation was first commenced by DeBoer Construction, Inc., after The Insurance Center, Inc., and Reliance Insurance Company denied liability on a construction contract surety bond fraudulently issued by their agent. The trial court gave judgment to DeBoer on several theories, including liability on the bond contract, negligent hiring and supervision of the agent, fraud, waiver of defenses, and estoppel to assert defenses. DeBoer was awarded $1.00 in punitive damages against Reliance. The trial court also gave Reliance a judgment for indemnity from Insurance Center. Each of the judgments is put in issue on appeal. We affirm in part and reverse in part. First, we will state the facts.

Insurance Center is an independent insurance agency doing business in Oklahoma City, Oklahoma. Reliance is an insurance company engaging in many types of insurance, including construction contract surety bonds. DeBoer is a construction company based in Wichita, Kansas. The perpetrator of the fraud in this case was one Gary Winfrey.* At the relevant times he was a general agent for Insurance Center in property and casualty insurance. He was also an assistant vice president of Insurance Center and manager of its bond department. Upon Insurance Center's request, he had been issued a power of attorney from Reliance authorizing him to execute construction bonds up to a maximum penal amount of $500,000. He was given instructions, however, not to write any bond without first obtaining approval from Reliance.

During 1969 and 1970, Winfrey engaged in a scheme with one Wayne Bruce to create several fraudulent bonds for Bruce's carpentry contracting company. Because of its financial condition, Bruce's company was unable to obtain legitimate bonds. Winfrey would provide bonds and appropriate the premiums, never notifying Insurance Center or

* Should be Dennis Winfrey

Reliance that bonds were being provided. Fraudulent bonds of this type were issued to DeBoer on two subcontracts with Bruce.

DeBoer's first contact wtih Winfrey was on an apartment complex in Oklahoma City known as Pheasant Run. Bruce was vying for a subcontract and introduced Winfrey as his bonding agent. Winfrey told DeBoer's representatives he could provide the necessary bonds. Bruce was awarded the subcontract in December 1969 and Winfrey later furnished separate payment and performance bonds. Winfrey's limited power of attorney was attached to both bonds. DeBoer officials testified they looked to see if a power of attorney was attached, but after seeing it was, they assumed everything was in order and did not read it in either case.

In March, 1970, Bruce and DeBoer entered into a carpentry subcontract, including labor and materials, for the construction of Seven Oaks apartment complex in Peoria, Illinois. During these negotiations, Winfrey represented that Bruce was bondable up to 10 or 11 million dollars. DeBoer was provided a performance bond in the penal amount of $925,000. Again the power of attorney limited to $500,000 was attached, but no one at DeBoer read it. A payment bond was promised by Winfrey, but was never delivered.

By July 1970, Bruce was in default on both projects. DeBoer's inquiry about collecting on the bonds led to the discovery of the fraud. A settlement was reached by which Reliance assumed liability on the Pheasant Run bonds which were within the $500,000 limit on Winfrey's authority. Liability was denied on the Seven Oaks bond, and this litigation ensued.

As we noted above, the trial court based its judgment on numerous theories.[1] Because of our disposition of the

[1] This case was complicated by the trial court's adoption of 250 findings of fact and 42 conclusions of law virtually verbatim from the proposals

case, we must consider each of them. We will attempt to do so in a logical order.

The first issue is whether Winfrey had apparent authority to bind Reliance on a $925,000 bond. On this issue we have the testimony of three DeBoer representatives—Jerry Gaddis, DeBoer's president; Jerry Andrews, DeBoer's vice president; and Raymond Slusser, DeBoer's field superintendent. Andrews and Slusser testified they never requested a meeting with Winfrey; Wayne Bruce brought him to a meeting and introduced him as his bonding agent. Gaddis testified no one at Insurance Center or Reliance ever represented to DeBoer that Winfrey was representing them. DeBoer representatives had visited with Winfrey at his Insurance Center office and had called him there. They knew he had Reliance bond forms and powers of attorney.

Regardless of whether this evidence is sufficient to establish apparent authority beyond that stated in the power of attorney, we have no doubt DeBoer is bound by the $500,000 limitation in his power of attorney. "[T]hose who deal with an agent knowing that he is authorized to act by virtue of a power of attorney are bound to ascertain and know the character and extent of the power of attorney under which he assumes to act." 3 Am. Jur. 2d *Agency* § 81 (1962); *accord*, Restatement 2d of Agency § 167 (1958). Comment *a* to the Restatement section explains the rule as follows:

> [I]f a person has means of knowledge reasonably open to him as to the limits of the agent's authority, he cannot hold the principal unless he uses ordinary diligence to ascertain them, even in those situations in which a principal is otherwise held although the agent goes beyond his authority. He has means of knowledge if he knows or has reason to know that the authority is evidenced by a document open to and intended for his inspection.

The rule is similarly stated in the Oklahoma statute defining constructive notice.

> Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself.

Okla. Stat. Ann. tit. 25, § 13 (1971).

The testimony of the responsible person at DeBoer, Jerry Andrews, shows he was aware that Winfrey's authority was defined in a power of attorney, that such instruments may contain limitations, and that he looked to see if one was attached to the bond, but did not read it. The testimony of others at DeBoer, namely Jerry Gaddis and Raymond Slusser, was to the same effect. The evidence falls squarely within the rule stated and DeBoer cannot escape its effect by relying on indicia of a greater apparent authority. Knowledge that an agent has limited authority defeats any right to rely on apparent authority. Mid-Continent Petroleum Corp. v. Wilhoit, 270 P.2d 645 (Okla. 1954); FDIC v. Grim, 86 P.2d 774 (Okla. 1938).

The trial court found DeBoer was excused from knowing the contents of the power of attorney primarily because of the great confidence contractors ordinarily place in bonding companies' representatives. This finding is clearly contradicted by the longstanding rule that it is always competent to limit the authority of an agent, and if the limitations have been brought to the attention of the per-

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[1] (Continued)
of DeBoer. We have previously expressed disapproval of this practice and noted that such findings are not as helpful to an appellate court as those drawn "with the insight of a disinterested mind." Edward B. Marks Music Co. v. Colorado Magnetics, Inc., 497 F.2d 285 (10th Cir. 1974), *cert. den'd*, 419 U.S. 1120.

son dealing with the agent, he is bound by them. 3 Am. Jur. 2d *Agency* § 77 (1962).[2]

For the same reasons Reliance and Insurance Center cannot be liable on the contract made by Winfrey, they cannot be liable for his fraud. A principal is liable for his agent's fraud committed within the apparent scope of his authority. Gilmore v. Constitution Life Ins. Co., 502 F.2d 1344 (10th Cir. 1974); Guardian Foundation v. Turner, 129 P.2d 592 (Okla. 1942); Barry v. Stevens, 31 P.2d 950 (Okla. 1934). If the agent's fraudulent representations are beyond his apparent authority to make on behalf of his principal, the principal cannot be liable. The agent's apparent authority for this purpose is determined in the same manner as his apparent authority to make a contract. *See* Restatement 2d of Agency § 257, Comment *a* (1958). We hold Winfrey's fraudulent representation that he could provide a valid bond for Bruce in the amount of $925,000 was beyond the apparent scope of his authority.

The trial court also held the limitation of authority in the power of attorney was ineffective because an investigation by DeBoer, had it discovered Winfrey's lack of authority, would not have disclosed the fraud. This was based on the court's findings that DeBoer logically would have inquired of Winfrey concerning the discrepancy and that Winfrey could have substituted another power of attorney (other Insurance Center employees had powers unlimited in amount), or otherwise covered his tracks without exciting DeBoer to investigate further. We cannot uphold the judgment on this basis. First, we think the inferences taken from the facts go too far. Second, the judgment in effect holds DeBoer could rely on representations by Winfrey as to his own authority rather than tracing it to his principal. If DeBoer officers had discovered Winfrey's lack of authority, they would have been bound to inquire of his principal. American Nat'l Bank v. Bartlett, 40 F.2d 21 (10th Cir. 1930).

[2] Although a bonding agent's prestige might be a relevant circumstance in determining an agent's apparent authority and the right of a third person to rely thereon, a power of attorney has long been considered an effective means of bringing limitations on authority to the third person's attention and defeating his right to rely on other evidence of authority. The trial court's holding would make powers of attorney without effect as limitations on bonding agents. We cannot agree that this is proper or desirable.

The judgment against Reliance and Insurance Center also was based on negligence. We fully agree with the trial court's finding that they were negligent both in hiring and in supervising Winfrey. The evidence showed he had neither the experience nor the training customarily required for one in his position. Supervision by Reliance and Insurance Center was nonexistent. Nevertheless, we do not believe DeBoer can recover on a negligence theory because it is barred by its contributory negligence. The obligation to exercise reasonable care is a reciprocal duty, Squyres v. Klick, 264 P.2d 325 (Okla. 1953), and we cannot look only at the conduct of Reliance and Insurance Center.

As we have stated in considering other issues in this appeal, the law imposes a duty to exercise reasonable care to ascertain the authority of an agent and to investigate facts that would put a reasonable man on inquiry. *E.g.*, Okla. Stat. Ann. tit. 25 § 13 (1971); 3 Am. Jur. 2d *Agency* § 78 (1962). DeBoer breached this duty when it failed to read Winfrey's power of attorney and discover his lack of authority. This failure contributed to DeBoer's injury. We believe the trial court's finding DeBoer was not guilty of contributory negligence is clearly erroneous.

The trial court found Reliance and Insurance Center were estopped from asserting any defenses to liability for Winfrey's acts. This finding was based on a misrepresentation made by Ben Lewis, the representative of Reliance and Insurance Center, at a meeting held to discuss a possible settlement. At this August 14, 1970, meeting, Lewis stated Reliance was still investigating the Seven Oaks bond

and would consider validating it if economically feasible to do so. He already knew, however, that a decision had been made to deny liability on this bond. An agreement was reached on the Pheasant Run bonds whereby Reliance agreed to accept liability on them in return for DeBoer's promise to release all retainage[3] due Bruce Construction under the contract. DeBoer contends it relied on the representations concerning Seven Oaks in making the Pheasant Run settlement.

The application of estoppel requires that the person to whom the misrepresentation was made must have relied on or acted upon it to his detriment. Gypsy Oil Co. v. Marsh, 248 P. 329 (Okla. 1926). Although we find Reliance's conduct thoroughly condemnable, we do not believe the evidence establishes any detrimental reliance by DeBoer. If DeBoer suffered any detriment, it was in relation to the Pheasant Run settlement, not Seven Oaks. We do not believe a false representation that investigation was continuing, recognizing the possibility that liability could still be denied, estops Reliance from actually denying liability. The statement was false, but not inconsistent with the position later taken. If DeBoer wishes to set aside the Pheasant Run settlement on the basis of fraud, that is a separate question. Reliance is not estopped from denying liability on the Seven Oaks bond.

DeBoer contends the trial court's judgment may be upheld on grounds of waiver and ratification by Reliance and Insurance Center. In our opinion, the evidence on these findings is so deficient that it requires no discussion. The trial court's findings of waiver and ratification are clearly erroneous.

The trial court rendered an alternative judgment in this case. It concluded that even if Winfrey's lack of au-

[3] The term "retainage" refers to the ten percent toward the total contract price DeBoer was authorized to retain from the progress payments until the construction was completed.

thority was a defense to liability in the face amount of the bond, $925,000, Reliance was nevertheless bound to the extent of authority granted in the power of attorney, $500,000. This is a matter of first impression in Oklahoma, and we are inclined to give great deference to the opinion of the resident federal district judge concerning that state's law. His view "carries extraordinary persuasive force on appeal where there are no state decisions on point or none which provide a clear precedent." Land v. Roper Corp., 531 F.2d 445, 448 (10th Cir. 1976); Stevens v. Barnard, 512 F.2d 876, 880 (10th Cir. 1975). In this case we have not been cited to any decision in point.

The issue is whether the principal should be bound on a contract to the extent his agent had authority when the agent made a contract in excess of his authority, defrauding both the principal and the third person with whom he dealt. The American Law Institute recognized the problem in Restatement 2d of Agency § 164 (1958), but did not attempt to state a rule. Section 164(2) states:

> Where the only difference between the contract as authorized and the contract as made is a difference as to amount, or the inclusion or exclusion of a separable part, the principal is liable upon the contract as it was authorized to be made, provided that the other party seasonably manifests his willingness to accept the contract as it was authorized.

The rule is followed by a caveat that it does not include the situation in which the agent in making the unauthorized terms also intends to act in fraud of the principal. No statement is made as to the proper rule in this situation.

There is considerable support in the cases for the Restatement rule of partial validity. The best collection of cases is contained in Walker v. Peake, 150 S.E. 756 (S.C. 1929). *See also* Lachmiller v. Lachmiller Engineering Corp., 301 P.2d 288 (Cal. App. 1956). The rule is statutory in

Oklahoma with respect to powers of attorney authorizing the disposition of real property. Okla. Stat. Ann. tit. 60, § 236 (1971). Unfortunately, the cases do not provide a discussion of the rationale for the rule which would aid us in determining whether it should apply when fraud is involved. According to the Restatement Comments and Reporter's Notes, it is a departure from strict contract principles in an attempt to obtain more equitable results. It is said to be comparable to the rule allowing ratification by a principal of a contract made in excess of the agent's authority. If the principal has the option of accepting the contract in a greater amount, the third person dealing with the agent should be able to accept the contract for the lesser amount originally authorized.

The fairness of the rule is apparent in the case of the honest but mistaken agent. The principal need not be given the option of avoiding the very contract he intended to make because of his agent's mistaken exercise of authority. The fair result is not so apparent when the agent has acted in fraud of the principal. As we stated in discussing other points, one dealing with an agent has a duty to exercise reasonable care to ascertain the agent's authority. One purpose of this rule is to prevent fraud by the agent. We do not believe, however, that the rule permitting partial validity is necessarily at odds with the rule designed to prevent fraud. Holding the principal liable to the extent he has given authority would not diminish the incentive of those dealing with an agent to ascertain his authority. They would still be subject to loss when the agent fraudulently exceeds his authority.

We see no inherent justice in holding the principal for the entire loss when his agent commits fraud within his authority and in allowing him to escape liability entirely when his agent exceeds his authority. The rule of partial validity could have a salutary effect in preventing the type of conduct involved in this case. Reliance set the dollar

limit on Winfrey's authority at a level it felt was an acceptable risk, considering the potential loss compared to the chances its agent would be unfaithful. Thinking itself adequately protected from financial loss, Reliance ignored its duty to supervise its agent and protect the public from loss should Winfrey execute a fraudulent contract in excess of his authority.[4] Dividing the responsibility in the event of loss could encourage both parties to exercise greater prudence than they did in this case.

In considering the legal theory justifying the partial validity rule of Restatement 2d § 164(2), Comment *a* states the rule subjects the principal to liability only in accordance with his expressed intent. Obviously, it is not altogether logical to say the principal subjectively intends to be bound by a contract made by his agent with intent to defraud. As noted above, however, the Comment also concedes the rule is based on equitable rather than contractual principles. We do not believe it does violence to the principle to apply it even when the agent is acting in fraud. The principal has manifested, in a sense, an intent to accept responsibility for his agent's conduct at least to the extent of his authority.[5]

We are not saying the rule of partial validity should apply in all cases involving fraudulent contracts by an agent where the only power exceeded is a limitation on the

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[4] A principal may not turn loose his agent on the public and then merely sit back and exercise little or no supervision." Gilmore v. Constitution Life Ins. Co., 502 F.2d 1344, 1348 (10th Cir. 1974).

[5] Reliance argues the rule of partial validity applies only when the agent has actual express authority to bind the principal. Reliance says its secret limitations on Winfrey's authority gave him no power to bind it without first obtaining its approval. We do not believe these secret limitations should have any effect on the rule. Under contract law a party's intent is determined from his open manifestations, not his secret or uncommunicated intent. *See* 1 Corbin on Contracts § 106 (1963). Under agency law secret limitations on authority generally have no effect on the rights of third persons dealing with the agent. *See* 3 Am. Jur. 2d *Agency* § 82 (1962).

amount. There are arguments on the other side of the issue that may be manifested in a different factual situation. Based on the facts of this case and the context in which it arises—from a judgment of state law by a resident district judge—we find nothing to convince us the trial court was wrong.

The trial court also found that if the performance was valid only to the extent of $500,000, additional damages suffered by DeBoer were covered by an oral contract for a labor and material payment bond. The issues raised are whether the oral promise is within the Statute of Frauds and, if it is, whether it is rendered enforceable under the doctrine of partial performance. Although the trial court found the oral promise was one of indemnity rather than guaranty and not within the Statute, we will assume for our purposes that it is within the Statute. Reliance has failed to show any basis upon which we could conclude the trial court was erroneous in holding there had been sufficient performance by DeBoer to take the contract out of the Statute.[6]

DeBoer argues it paid the premium for the bond and this is sufficient part performance. Reliance answers this argument in one sentence: "There was no 'full or partial performance' as those terms are used by the Oklahoma Supreme Court in making exceptions to the Statute of Frauds." Reliance offers no explanation and citation of authority. We would note that as to contracts involving interests in land, payment alone is not sufficient to take an oral contract out of the Statute under Oklahoma law. *E.g.*, Hickey v. Ross, 172 P.2d 771 (Okla. 1946). There are, however, significant differences between land contracts and promises to answer for the debt or default of another, and we do not believe these cases are necessarily controlling.

[6] We are not sure the Statute of Frauds arguments go to the heart of matters concerning the oral promise of a payment bond. However, it is the only issue clearly drawn in the statement of points and in the briefs. We will resolve the issue in that context.

In 73 Am. Jur. 2d *Statute of Frauds* § 468 (1974) it is stated that the part performance doctrine does not apply to promises to answer for the debt or default of another.[7] While recognizing this as the general rule, 37 C.J.S. *Frauds, Statute of* § 253 (1943) says there is authority holding complete performance by one party will take such a promise out of the Statute. Considering the apparent lack of controlling authority, we believe we should follow our established policy of deferring to the judgment of the resident district judge. Land v. Roper Corp., *supra*, and cases cited therein.

In addition to actual damages, the trial court held Reliance was liable for punitive damages in the amount of $1.00. Because we have held Reliance is not liable under a fraud theory, it follows that the award of punitive damages must be reversed. Reliance is not chargeable with the fraud, malice or oppression required to support the imposition of punitive damages. *See* Oden v. Russell, 251 P.2d 184 (Okla. 1953).

Finally, we must consider the trial court's judgment of indemnity against Insurance Center in favor of Reliance. The trial court made no findings of fact or conclusions of law specifically relating to this issue. However, we believe the documentary evidence and the other trial court findings are sufficient to allow review of the arguments presented by Reliance in support of the judgment.

The only plausible theory argued by Reliance is that Insurance Center's failure to prevent Winfrey's wrongful act constitutes a breach of the agency agreement between them. The record indicates this probably was the basis for

[7] The reason given for the rule in § 468 is that the guarantor receives no benefit from the acceptance of his oral promise. This assumes the guarantor is uncompensated and his only consideration is the third person's agreement to deal with the principal debtor. The present case is distinguished by the fact it involves a commercial surety which receives premiums in return for its guarantees.

the trial court's holding. As a matter of appellate review, we are in as good a position as the trial court to interpret the meaning of a written contract. Rockwood & Co. v. Adams, 486 F.2d 110 (10th Cir. 1973). The provision cited by Reliance states: "The Agent [Insurance Center] is hereby granted authority to solicit and submit applications for . . . surety bonds; . . . in the case of bond such authorization to be set forth in Powers of Attorney and letters of limitation. . . ." As we read the contract, it requires Insurance Center to obtain authority in powers of attorney before allowing any of its agents to solicit and submit surety bonds. Had Insurance Center allowed Winfrey to sell bonds without obtaining authority for him from Reliance, it would have breached the agreement. Having requested authority for Winfrey, Insurance Center complied with the agreement. Reliance then entered a separate agreement with Winfrey and can look only to him to recover its loss.

The trial court specifically found: "Dennis Winfrey was the agent of Reliance Insurance Co. and had authority and the power to bind Reliance in all material respects in this action." By giving Winfrey a power of attorney to act for it, Reliance became his principal and Winfrey had power to bind Reliance directly. We have held he succeeded in doing so in this case to the extent of the authority contained in his power of attorney. His authority to execute Reliance bonds came from Reliance, not Insurance Center. As a matter of contract, Winfrey bound Reliance alone.

Since our judgment is not based on tort law, we need not consider Reliance's arguments concerning its right to indemnity from Insurance Center as a joint tortfeasor.

We have now considered all the issues relating to liability and turn to the issues concerning damages. The trial court found DeBoer was entitled to recover $79,089.60 under the labor and materials payment bond. No error is alleged in the computation of this amount. Under the performance bond, the trial court found DeBoer was entitled to $446,350.06 in cost of completion damages and an additional $108,000.00 in delay damages. Reliance contends the allowance of delay damages was erroneous. Since we have held Reliance liable on the performance bond only to the extent of $500,000, only part of the delay damages is recoverable if properly allowed.

The only evidence that DeBoer suffered loss as a result of delay was the evidence that its sister corporation, Seven Oaks, Inc., which was the owner of the project, had to pay an extra $108,000 in interest on the interim construction loan. Seven Oaks, Inc., and DeBoer Construction, Inc. were both wholly-owned subsidiaries of Jack P. DeBoer Associates, Inc. There was no evidence that DeBoer Construction was charged in any way for delay damages. DeBoer defends the award on the ground that a backcharge between these wholly-owned subsidiary corporations would be a useless act not required by law. We do not agree.

DeBoer's argument asks us to disregard the separate legal identities of these two corporations. This is the converse of the usual situation in which the rule for disregarding the corporate entity is applied to prevent injustice to a third person injured by the subsidiary corporation. Although indicating it might be allowed in a proper case, the courts have not looked favorably upon shareholders' attempts to deny the existence of their own corporations. Those responsible for the existence of a corporation are not entitled to have it disregarded in order for them to gain an advantage that would be lost under it. 1 W. Fletcher, Private Corporations § 41.2 n. 24 (Rev. Ed. 1974), and cases cited therein. This Court has noted that Oklahoma law permits disregard of the corporate entity if used to defeat public convenience, justify wrong, perpetrate actual or implied fraud, or defend crime. Robertson v. Roy L. Morgan Production Co., 411 F.2d 1041 (10th Cir. 1969). The reason for doing so when these factors are present is quite

clear. "Where, however, a corporation or an individual has organized another corporation to carry on a particular operation, the reasons for permitting a parent corporation to disregard for purposes of suit the separate identity of the wholly-owned subsidiary corporation are not apparent." E. M. Fleishmann Lumber Corp. v. Resources Corp. Int'l, 105 F. Supp. 681, 690 (D. Del. 1952). In cases analogous to the present, the courts have denied a plaintiff the right to disregard a corporate entity it created in order to recover additional damages. Verzani v. State Dept. of Roads, 195 N.W.2d 762 (Neb. 1972); Sams v. Redevelopment Authority, 244 A.2d 779 (Pa. 1968).

In the present case we see no reason to disregard the separate identities of Seven Oaks, Inc., and DeBoer Corporation. Moreover, there is good reason to refuse. Because of the limited liability of the separate corporations, there would be potential danger to creditors of the corporation which retained the loss on its books without directly obtaining a recovery. The parent of both subsidiary corporations could let the one accept the loss and go into bankruptcy while retaining the recovery in the corporation which does not show the loss. Therefore, we believe the two corporations must be treated as the separate persons they are intended by law to be. Proof that Seven Oaks suffered certain damages is in no way proof of DeBoer Construction's damages. DeBoer failed to produce evidence of its damages for delay and cannot recover them.

Several other issues have been raised in the briefs. We have reviewed them and find only one that merits further discussion in this opinion. All parties are agreed that the trial court erroneously compounded postjudgment interest upon prejudgment interest in computing the amount of the judgment. Our disposition of the case will require recomputation of the interest and this mistake may be avoided on remand.

We affirm the judgment insofar as it holds Reliance liable for $446,350.06 on the Seven Oaks performance bond and for $79,235.44 on the oral promise of a labor and materials payment bond. The judgment against Insurance Center is reversed. The case is remanded for the entry of a proper judgment in accordance with this opinion.

APPENDIX B

(Entered September 17, 1976)

JULY TERM—September 17, 1976

Before The Honorable David T. Lewis, Chief Judge,
The Honorable Jean S. Breitenstein, Senior Judge,
The Honorable Delmas C. Hill,
The Honorable Oliver Seth,
The Honorable William J. Holloway, Jr.,
The Honorable Robert H. McWilliams,
The Honorable James E. Barrett and
The Honorable William E. Doyle, Circuit Judges

DE BOER CONSTRUCTION, INC., Plaintiff-Appellee,	)	
vs.	)	No. 74-1581
RELIANCE INSURANCE COMPANY, a corporation, Defendant-Appellant,	)	
THE INSURANCE CENTER, INC., a corporation, BRUCE DEVELOPMENT CORP., a corporation, WAYNE BRUCE, Defendants.	)	

DE BOER CONSTRUCTION, INC., Plaintiff-Appellee,	)	
vs.	)	No. 74-1582
THE INSURANCE CENTER, INC., a corporation, Defendant-Appellant,	)	
RELIANCE INSURANCE COMPANY, a corporation, BRUCE DEVELOPMENT CORP., a corporation, WAYNE BRUCE, Defendants.	)	
DE BOER CONSTRUCTION, INC., Plaintiff-Appellant,	)	
vs.	)	No. 74-1583
RELIANCE INSURANCE COMPANY, a corporation, THE INSURANCE CENTER, INC., a corporation, BRUCE DEVELOPMENT CORP., a corporation, WAYNE BRUCE, Defendants-Appellees.	)	

This matter comes on for consideration of the petition for rehearing filed by Reliance Insurance Company in the captioned causes and the suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by Senior Circuit Judge Breitenstein and Circuit Judges Hill and Barrett to whom the case was argued and submitted.

The petition for rehearing having been denied by the original panel to whom the case was argued and submitted

and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS, Clerk

s/ By Robert L. Hoecker
Robert L. Hoecker
Chief Deputy Clerk

A true copy
Teste

(Seal)

Howard K. Phillips
Clerk, U. S. Court of
Appeals, Tenth Circuit

By Linda A. Hall
Deputy Clerk

APPENDIX C

FILED
MAY 7 1974
REX B. HAWKS
CLERK U. S. DISTRICT COURT
WALTER A. MOUNTS
Deputy

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

DeBOER CONSTRUCTION, INC.,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	
RELIANCE INSURANCE COMPANY, a Corporation; THE INSURANCE CENTER, INC., a Corporation; BRUCE DEVELOPMENT CORP., a Corporation; WAYNE BRUCE,	)	No. CIV-71-252
	)	
Defendants.	)	

JOURNAL ENTRY OF JUDGMENT

Based upon the Findings of Fact and Conclusions of Law filed herein on this day and date, the Court enters its judgment as follows:

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff, DeBoer Construction, Inc., have and recover judgment against defendants, Reliance Insurance Company, a corporation, The Insurance Center, Inc., a corporation, Bruce Development Corp., a corporation and Wayne Bruce, jointly and severally in the amount of $729,235.44 together with interest thereon at the rate of ten percent (10%) per annum as provided by law and until such time as said judgment is satisfied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff, DeBoer Construction, Inc., have and recover judgment against the defendant, Reliance Insurance Company, in an additional sum to the judgment hereinbefore rendered in the amount of $1.00 as and for punitive damages.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant, Reliance Insurance Company, have and recover judgment against the defendants, The Insurance Center, Inc., Bruce Development Corp. and Wayne Bruce for all sums of money paid by Reliance Insurance Company to the plaintiff, DeBoer Construction, Inc.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Counter-Claim of Bruce Development Corp. against the plaintiff, DeBoer Construction, Inc., be and the same is hereby denied and dismissed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the court costs herein expended be assessed against the defendants.

Dated this 7th day of May, 1974.

s/ Luther Bohanon
UNITED STATES DISTRICT JUDGE

ENTERED IN JUDGMENT DOCKET
ON MAY 7, 1974

ADELAIDE HOLSTON, DEPUTY

APPENDIX D

OKLAHOMA STATUTES

CHAPTER 21.—UNIFORM CERTIFICATION OF QUESTIONS OF LAW ACT [NEW]

Laws 1973, C. 22, Operative July 1, 1973

§ 1601. Short title

This act may be cited as the Uniform Certification of Questions of Law Act.

§ 1602. Power to answer

The Supreme Court and the Court of Criminal Appeals respectively may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, a United States District Court, or the highest appellate court or the intermediate appellate court of any other state, when requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court or Court of Criminal Appeals of this state.

§ 1603. Method of invoking

This act may be invoked by an order of any of the courts referred to in Section 2 upon the court's own motion or upon the motion of any party to the cause.

§ 1604. Contents of certification order

A certification order shall set forth:

1. The questions of law to be answered; and

2. A statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose.

§ 1605. Preparation of certification order

The certification order shall be prepared by the certifying court, signed by the judge presiding at the hearing, and forwarded to the Supreme Court or Court of Criminal Appeals by the clerk of the certifying court under its official seal. The Court to which the certification order is directed may require the original or copies of all or of any portion of the record before the certifying court to be filed with the certification order, if, in the opinion of the Court, the record or portion thereof may be necessary in answering the questions.

§ 1606. Costs of certification

Fees and costs shall be the same as in civil appeals docketed before the Supreme Court and shall be equally divided between the parties unless otherwise ordered by the certifying court in its order of certification.

§ 1607. Briefs and argument

Proceedings in the Supreme Court or Court of Criminal Appeals shall be as provided by rule of the court or by law governing briefs and arguments.

§ 1608. Opinion

The written opinion of the Supreme Court or Court of Criminal Appeals stating the law governing the questions certified shall be sent by the clerk under the seal of the Court to the certifying court and to the parties.

§ 1609. Power to certify

The Supreme Court or the Court of Criminal Appeals of this state, on their[1] own motion or the motion of any party, may order certification of questions of law to the

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[1] Should probably read "its".

highest court of any state when it appears to the certifying court that there are involved, in any proceeding before the court, questions of law of the receiving state which may be determinative of the cause then pending in the certifying court and it appears to the certifying court that there are no controlling precedents in the decisions of the highest court or intermediate appellate courts of the receiving state.

§ 1610. Procedure on certifying

The procedures for certification from this state to the receiving state shall be those provided in the laws of the receiving state.

§ 1611. Construction

This act shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

§ 1612. Severability

The provisions of this act are severable and if any part or provision hereof shall be held void the decision of the court so holding shall not affect or impair any of the remaining parts or provisions of this act.

§ 1613. Operative date

The provisions of this act shall become operative from and after July 1, 1973.

CERTIFICATE OF SERVICE

I hereby certify that the following named parties,

Mr. Brian G. Grace
Curfman, Brainerd, Harris, Bell, Weigand & Depew
803 First National Bank Building
Wichita, Kansas 67202

Mr. William J. Ross
Rainey, Flynn, Welch, Wallace, Ross & Cooper
735 First National Center
Oklahoma City, Oklahoma 73102
Attorneys for DeBoer Construction, Inc.

Mr. Wm. G. Smith
Fenton, Fenton, Smith, Reneau & Moon
P. O. Box 1638
Oklahoma City, Oklahoma 73192
Attorneys for The Insurance Center, Inc.,

required by law to be served in this case, were this day mailed three copies of the foregoing Petition for Certiorari, postage prepaid.

Dated: October 28, 1976.

John B. Hayes

John B. Hayes